



**NOTICE OF MODIFICATIONS OF PROPOSED REGULATIONS
AND PUBLIC HEARING**

**California Code of Regulations
Title 2. Administration
Division 1. Administrative Personnel
Chapter 1. State Personnel Board
Article 4. Hearings and Appeals**

DATE: November 11, 2005

**TO: ALL STATE AGENCIES, EMPLOYEE ORGANIZATIONS, AND
MEMBERS OF THE GOVERNOR'S CABINET**

**SUBJECT: TITLE 2, CALIFORNIA CODE OF REGULATIONS §§ 56 THROUGH
56.8 - WHISTLEBLOWER COMPLAINT PROCEDURES
REGULATIONS**

Under the authority established in Government Code (GC) § 18701, and pursuant to GC § 11346.8(c), the State Personnel Board (SPB) is providing notice of changes that are being considered concerning the above-named regulations, which were the subject of public hearings held in August and October 2005. As a result of written comments and oral testimony received, parts of the regulations have been modified from what was originally made available. Please take notice that a public hearing regarding the modifications to the original proposed regulations made available is scheduled for:

Date and Time: December 6, 2005 - 9:30 a.m. to 10:00 a.m.

Place: 455 Golden Gate Avenue, Benicia Room
San Francisco, CA 94102

Purpose: To receive comments about this action.

A copy of the full text of the regulations as originally proposed and the modifications are attached. SPB's rulemaking file on the proposed action is open to public inspection by appointment Monday through Friday, from 8:00 a.m. to 5:00 p.m. at 801 Capitol Mall, Room 555, Sacramento, CA 95814.

Modifications to Whistleblower Retaliation Complaint Regulations
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WRITTEN PUBLIC COMMENT PERIOD:

The written public comment period will close on Monday, November 28, 2005 at 5:00 p.m. Any person may submit written comments about the proposed modifications. To be considered by SPB, written comments must be received by Bruce Monfross at SPB, P.O. Box 944201, Sacramento, CA 94244-2010, before the close of the written comment period. During this comment period, written comments may also be e-mailed to Bruce Monfross at **bmonfross@spb.ca.gov** or faxed to (916) 653-4256.

Additional information or questions regarding the substance of the proposed action should be directed to Bruce Monfross at (916) 653-1403. Questions regarding the regulatory process in conjunction with these regulations may be directed to Elizabeth Montoya, the backup contact person, at (916) 654-0842 or TDD (916) 653-1498.

/s/Laura M. Aguilera

Laura M. Aguilera
Assistant Executive Officer

Attachment: Proposed Text of Amended Regulations

REGULATIONS GOVERNING WHISTLEBLOWER RETALIATION COMPLAINTS

Changes to the original text are illustrated in the following manner: regulation language originally proposed is underlined; deletions from the language originally proposed are shown in strikeout using a “-“, and additions to the language originally proposed are double underlined and italicized.

TITLE 2. Administration DIVISION 1. Administrative Personnel CHAPTER 1. State Personnel Board SUBCHAPTER 1. General Civil Service Regulations

ARTICLE 4. Hearings and Appeals

§ 56. Whistleblower Retaliation Complaint Process.

(a) Any state employee or applicant for state employment, or any employee or applicant for employment with a California Community College, who believes that he or she has been retaliated against in employment for having reported improper governmental activity, as that phrase is defined in Government Code Section 8547.2(b), or Education Code Section 87162(c), or for having refused to obey an illegal order or directive, as defined in Government Code Section 8547.2(e), or Education Code Section 87162(b), may file a complaint and/or appeal with the ~~Board~~ State Personnel Board in accordance with the provisions set forth in Sections 56.1 - 56.8. For purposes of complaints filed by community college employees or applicants for community college employment, the local community college district shall be deemed the "appointing power."

(b) For purposes of Sections 56 – 56.8, the term “Board” is defined as the five-member State Personnel Board, as appointed by the Governor. The term “Executive Officer” is defined as the Executive Officer of the State Personnel Board, as appointed by the Board. The State Personnel Board shall hereinafter be referred to as the SPB.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Sections 87162, 87164, Education Code; and Sections 8547.2, 8547.8, and 19683, Government Code.

§ 56.1. Requirements for Filing Whistleblower Retaliation Complaint with the ~~Appeals Division of the~~ State Personnel Board.

An individual desiring to file a complaint of retaliation with the ~~Board~~ SPB must adhere to the following requirements:

(a) Prior to filing his or her complaint with the Board SPB, the complainant shall comply with all other filing requirements, if applicable, set forth in Government Code Section 19683.

(b) The complaint shall be filed with and received by the Appeals Division SPB within one year of the most recent alleged act of reprisal. The complaining party shall submit an original complaint and copy of all attachments, and enough copies of the complaint and attachments for the Appeals Division SPB to serve each entity and person alleged to have engaged in retaliatory conduct and against whom damages and/or disciplinary action is sought.

(c) All complaints shall be in writing.

(d) Each complaint shall:

(1) ~~identify the facts that form the basis of the complaint, including, but not limited to: the improper governmental activity that the complainant reported, or the illegal order or directive the complainant refused to obey; the date the complainant reported the improper governmental activity, or refused to obey the illegal order or directive; the person(s) to whom the complainant reported the improper governmental activity, or to whom the complainant stated that he or she would not obey the illegal order or directive; the improper personnel action, as defined in Government Code Section 8547.3(b), or Education Code Section 87163(b), the complainant experienced as a result of reporting the improper governmental activity, or refusing to obey an illegal order or directive; the date on which the improper employment action occurred; and all information that the complainant possesses that shows that the improper employment action occurred as a result of complainant's report of improper governmental activity, or refusal to obey the illegal order or directive;~~

(A) ~~For purposes of this section, "improper personnel action" includes, but is not limited to, promising to confer, or conferring, any benefit; effecting, or threatening to effect, any reprisal; or taking, or directing others to take, or recommending, processing, or approving, any personnel action, including, but not limited to, appointment, promotion, transfer, assignment, performance evaluation, suspension, or other disciplinary action; as well as intimidating, threatening, coercing, commanding, or attempting to intimidate, threaten, coerce, or command the complainant, for the purpose of interfering with the complainant's rights conferred pursuant to applicable statutes.~~

(2) ~~include as attachments all non-privileged documents, records, declarations and other information in the complainant's possession, custody, or control that are relevant to the complaint of retaliation;~~

(3) ~~include as an attachment a list of all documents or records relevant to the complaint of retaliation that are not in the complaining party's possession, custody, or control, but which he or she reasonably believes to be in the possession, custody, or control of the appointing power or any individually named respondent to the complaint;~~

(4) ~~identify all respondents known to the complainant (i.e., the appointing power as well as all state civil service or community college employees alleged to have retaliated against the complainant), and identify the business address of each respondent named as a party to the complaint;~~

~~(5) have attached any complaints of retaliation previously filed with the appointing power concerning the same retaliatory acts alleged in the complaint filed with the Board, and a copy of the written response of the appointing power to the complaint, if such response has been provided to the complainant. If the appointing power provides a written response to any such previously filed complaint of retaliation to the complainant after the complaint has been filed with the Appeals Division, the complainant shall file a copy of any response with the Appeals Division within 5 days of receipt of the written response;~~

~~(6) specify the relief and/or remedies sought, including any compensatory damages sought;~~

~~(7) If adverse action is sought against any individually named respondent, pursuant to the provisions of Government Code Section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto. If the material facts alleged are not within the personal knowledge of the complainant, the complaining party may be required to present supporting affidavits from persons having actual knowledge of the facts before acting upon the request for adverse action. Any failure to comply with the provisions of this section shall constitute a waiver on the part of the complainant to subsequently seek disciplinary action against any individually named respondent;~~

~~(8) include a sworn statement, under penalty of perjury, that the contents of the written complaint are true, or believed by the complainant to be true; and~~

~~(9) be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the complaint stating the reasons for good cause.~~

(d) Each complaint shall clearly identify the protected activity engaged in by the complainant, the specific act(s) of reprisal or retaliation alleged to have occurred, and the names and business address of the individual(s) and entities alleged to have committed the retaliatory act(s). Each complaint shall specify the relief and/or remedies sought against each entity or individual, including any compensatory damages sought.

~~(e) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code Section 19575, when appealing a notice of rejection during probation, pursuant to Government Code Section 19175, when appealing a notice of medical action, pursuant to Government Code Section 19253.5, or when appealing a notice of non-punitive action, pursuant to Government Code Section 19585.~~

(e) If adverse action is sought against any individually named respondent, pursuant to the provisions of Government Code Section 19574, the complaint must clearly state the facts constituting the cause or causes for adverse action in such detail as is reasonably necessary to enable the accused employee to prepare a defense thereto.

(f) Each complaint shall include a sworn statement, under penalty of perjury, that the contents of the written complaint are true and correct.

(g) Each complaint shall be limited to a maximum of 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the complaint stating the reasons for good cause.

(h) The above procedures do not apply in those cases where an appellant raises retaliation as an affirmative defense when appealing a notice of adverse action, pursuant to Government Code Sections 19575 or 19590, when appealing a notice of rejection during probation, pursuant to Government Code Section 19175, when appealing a notice of medical action, pursuant to Government Code Section 19253.5, when appealing a notice of non-punitive action, pursuant to Government Code Section 19585, or when appealing a notice of career executive assignment termination pursuant to Government Code Section 19889.2. Neither the remedies nor the relief available to a complaining party pursuant to the provisions of Government Code Sections 8547.8 or 19683, shall, however, be available to a party who raises whistleblower retaliation as either an affirmative defense or as a separate cause of action in any other ~~Board~~ SPB hearing, unless that party has first complied with all filing requirements set forth in Section 56.1.

NOTE: Authority cited: Sections 18701 and 18214, Government Code. Reference: Section 87164, Education Code; Sections 8547.3, 8547.8, 18670, 18671, 18675, 19175, 19253.5, 19572, 19583.5, 19585, 19683 and 19889.2; and Section 6129, Penal Code.

§ 56.2. Acceptance of Whistleblower Complaint; ~~Notice; Findings of the Executive Officer.~~

(a) Within 10 working days of receipt of the complaint, the ~~Appeals Division~~ Board SPB shall initiate an investigation to determine if whether the ~~Board~~ it has jurisdiction over the complaint and to determine if whether the complainant meets the filing requirements set forth in Section 56.1. The ~~Appeals Division~~ Board SPB shall also determine if whether the complainant has complied with all other requirements for filing a retaliation complaint, as set forth in Government Code Sections 8547-8547.12 and 19683 and/or Education Code Sections 87160-87164; and ~~Section 56.1 of these regulations.~~

(b) If the ~~Appeals Division~~ Board SPB determines that all filing requirements have not been satisfied the complaint does not meet all filing requirements, it shall notify the complaining party in writing that the complaint has not been accepted and the reason(s) for that determination. The complaining party shall ~~may thereafter~~ be permitted to file an amended complaint within ~~15~~ 10 working days of receipt service of the notice of non-acceptance of the complaint.

(c) ~~Within 10 working days of receipt of the amended complaint, the Appeals Division shall initiate an investigation to determine if the Board has~~

~~jurisdiction over the amended complaint, and to determine if the amended complaint meets the filing requirements set forth in Section 56.1. For purposes of determining the one year limitation period, the date that the original complaint is filed with the Board shall be deemed the filing date for the amended complaint. If the Appeals Division determines that all filing requirements have not been satisfied, it shall notify the complaining party in writing that the amended complaint has been rejected and the reason(s) for that determination.~~

~~(d) If the Appeals Division accepts the complaint, it shall notify the complaining party in writing that the complaint has been accepted, and shall serve a copy of the complaint or amended complaint on all respondents named in the complaint. Service of the complaint or amended complaint on the appointing power may be accomplished by mailing a copy of the complaint or amended complaint, with a proof of service attached, to the business address of the executive in charge of the Department, Agency, District or Board, and/or to the Legal Office of the appointing power. Service of the complaint or amended complaint on the individually named respondents may be accomplished by mailing a copy of the complaint or amended complaint, with a proof of service attached, to the business address of each individually named respondent.~~

~~(e) Within 20 working days after service of notice of acceptance of the complaint, each named respondent shall file with the Appeals Division and serve on all named parties a written response to the complaint. The written response shall include specific and detailed factual information that refutes the complainant's allegations, and shall include all non-privileged documents, records, declarations and other information in the respondent's possession, custody, or control that are relevant to the complaint of retaliation. Each written response shall have attached a Proof of Service. Service of the response may be accomplished by mailing a copy of the reply to both the Appeals Division and the home or business address of the complaining party. Each written response shall be limited to no more than 15 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The respondent shall submit a separate document with the response stating the reasons for good cause. The Appeals Division may grant an extension of time in which to file a written response to the complaint upon a showing of good cause by the requesting party.~~

~~(f) If the complainant desires to file a written reply to the written response(s), he or she shall file the reply with the Appeals Division and serve a copy of the reply on all named parties to the complaint within 10 working days after service of the response(s) of the named respondent(s). Service of the reply may be accomplished by mailing a copy of the reply to the Appeals Division and the business address of each named respondent, with proof of service attached. Each written reply shall be limited to no more than 10 pages of double-spaced typed or printed text, not including exhibits. Additional pages may be allowed upon a showing of good cause. The complainant shall submit a separate document with the reply stating the reasons for good cause. The Appeals Division may grant an extension of time in which to file a written reply to any response received concerning the complaint upon a showing of good cause. The~~

~~Appeals Division may, in its sole discretion, condition the granting of any such request for an extension of time upon the complainant's agreement to extend the 60 working day requirement for the issuance of a Notice of Findings for a period of time commensurate with the extension of time granted to the complainant to submit his or her written reply.~~

~~(g) Upon acceptance of any written responses, the Appeals Division shall continue its investigation, with or without a hearing, pursuant to Government Code Sections 8547-8547.12 and 19683. In conducting the investigation, the Appeals Division may require any party to the complaint to submit whatever other information it deems necessary to investigate the complaint. For purposes of this section, the phrase "party to the complaint" is limited to the complaining party and/or any respondent named in the complaint.~~

~~(h) In those instances where any party to the complaint requests, pursuant to this Section, that the appointing power produce records or documents relevant to the complaint, and the appointing power asserts a privilege or exemption as to the records or documents requested, the following procedure shall apply:~~

~~(1) Within 5 working days of the appointing power invoking a privilege or exemption concerning the requested records or documents, either the requesting party or the appointing power may submit a request for review of the issue in writing to the State Personnel Board Chief Administrative Law Judge for resolution. The party submitting the matter to the Chief Administrative Law Judge shall, on that same day, notify the non-moving party, both telephonically and in writing, that the matter has been submitted for review by the Chief Administrative Law Judge;~~

~~(2) The requesting party and the appointing power and/or other named respondent shall submit written briefs to the Chief Administrative Law Judge, concerning the disputed documents, and indicating why the disputed documents should or should not be produced. Any such brief shall be filed within 5 working days of the date that notice of the dispute is first submitted to the Chief Administrative Law Judge;~~

~~(3) Except as set forth in subsection (4) of this subdivision, when submitting its brief concerning the disputed records or documents, the appointing power shall include a copy of the disputed records or documents for purposes of an in camera review by the Chief Administrative Law Judge, or his or her designee;~~

~~(4) In those cases where the appointing power and/or other named respondent declines to produce the requested documents for purposes of an in camera review on the grounds that such disclosure is not required by law, the appointing power shall cite the specific legal authority that renders the disclosure improper;~~

~~(5) The Chief Administrative Law Judge, or his or her designee, shall issue his or her decision concerning the disputed documents within 5 working days of receipt of the parties written briefs;~~

~~(6) If any party to the dispute disagrees with the decision of the Chief Administrative Law Judge, or his or her designee, they may file a petition for writ of mandate in the superior court, seeking an interlocutory review of that decision;~~

~~(7) The 60 working day period for the issuance of the Notice of Findings by the Executive Officer shall be tolled pending the resolution of any such dispute concerning the requested documents.~~

~~(i) Within 60 working days of service of the Board's notice of acceptance of the complaint, the Executive Officer shall issue and serve on complainant and each named respondent a Notice of Findings concerning the complaint of retaliation, unless the 60 working day period has been waived or tolled under subsection (f) or (h) of this section.~~

~~(j) In those cases where the Executive Officer concludes that the complainant failed to prove the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall, except in those instances where the findings address jurisdictional and/or procedural matters, specifically address each allegation contained within the complaint.~~

~~(k) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. The Notice of Findings shall also, except in those instances where the findings address jurisdictional and/or procedural matters, specifically refer to the information offered both in support of, and in opposition to, each allegation contained within the complaint. If it is determined that any individual manager, supervisor, or other state civil service employee engaged in improper retaliatory acts, the Notice of Findings and the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.~~

~~(l) In those cases where the Executive Officer concludes that material questions of fact exist concerning whether the complainant established retaliation for having engaged in whistleblowing activities, the Executive Officer may, in his or her sole discretion, assign the case to an evidentiary hearing before a Board Administrative Law Judge.~~

~~(m) The Notice of Findings shall inform each named party of his or her respective right to file a Petition for Hearing Before the Board, pursuant to the provisions of Section 56.3 and/or 56.4. However, in those cases where the Executive Officer issues a Notice of Findings assigning the matter to an evidentiary hearing pursuant to the provisions of subdivision (l), no party to the complaint shall be entitled to file either a Petition for Hearing before the Board, nor a Petition for Order of Remedies.~~

(c) Unless time is extended by the complaining party in writing, the Executive Officer shall, within 10 working days of receipt of the complaint or amended complaint, notify the complaining party of a decision to either:

(1) dismiss the complaint for failure to meet jurisdictional or filing requirements; or

- (2) refer the case for investigation and/or an investigative hearing in accordance with the provisions of Section 56.3; or
- (3) schedule the case for an informal hearing before an administrative law judge, in accordance with the provisions of Section 56.34.
- (d) In accordance with the provisions of Penal Code Section 6129, the SPB shall be entitled to defer review of a complaint filed by an employee of the Department of Corrections and Rehabilitation in those cases where the employee has filed a similar complaint with the Office of the Inspector General.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Sections 87160-87164, Education Code; Sections 8547-8547.2, 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.

§ 56.3. Petition for Hearing by Complainant Before the Board. Cases Referred to Investigation or Investigative Hearing.

- ~~(a) If the Notice of Findings concludes no retaliation occurred, the complainant may file a Petition for Hearing before the Board.~~
- ~~(b) A Petition for Hearing under this section must be filed with the Executive Officer and served on each named respondent(s) to the complaint within 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with a proof of service attached, to the business address of each named party to the complaint.~~
- ~~(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues, defenses, or requests for relief raised in the written pleadings filed during the Notice of Findings process. Any allegation, issue, defense, or request for relief not raised in the written pleadings during the Notice of Findings process shall be deemed waived, except upon petition and determination by the Board of good cause.~~
- ~~(d) Each respondent named in the complaint shall be permitted an opportunity to submit a written opposition to the Petition for Hearing. Any written opposition to the Petition for Hearing shall be filed with the Board and served on the complainant no later than 20 days after the date the Petition for Hearing was served on the respondent.~~
- ~~(e) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.3(c), and whether the Notice of Findings is supported by substantial evidence.~~
- ~~(f) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer as its own decision in the matter.~~
- ~~(g) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution rejecting the findings of the Executive Officer and assign the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with those statutes and regulations governing the conduct of Board~~

evidentiary hearings, and issue a Proposed Decision for the Board's review and consideration.

~~(h) The evidentiary hearing shall be based solely on those allegations, issues, defenses, and requests for relief raised by the parties in the written pleadings during the Notice of Findings process, except in those cases where the Board has determined, pursuant to subdivision (c) of this section, that good cause exists to permit the moving party to amend the pleadings. Any document submitted by any party as an attachment or exhibit to the written pleadings during the Notice of Findings process shall not be considered by the administrative law judge during the evidentiary hearing, unless each document is first introduced and deemed to be relevant and admissible evidence by the administrative law judge during the course of the evidentiary hearing. Each named respondent shall have the right to be represented by a legal representative of his or her own choosing during the hearing, and to present a defense to the allegations contained in the complaint, separate and apart from the defense presented by any other named respondent.~~

~~(i) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.~~

(a) If the Executive Officer assigns a complaint for investigation or an investigative hearing, the Executive Officer or the assigned investigator(s) shall conduct the investigation and/or investigative hearing in the manner and to the degree they deem appropriate, and shall have full authority to question witnesses, inspect documents, and visit state facilities in furtherance of their investigations. All state agencies and employees shall cooperate fully with the investigators, or be subject to disciplinary action for impeding the investigation. The investigators, pursuant to the provisions of Government Code Section 18671, shall have authority to take depositions, issue subpoenas, order the production of documents, and take any other action administer oaths, subpoena and require the attendance of witnesses and the production of books or papers, and cause the depositions of witnesses residing within or without the state to be taken in the manner prescribed by law for like depositions in civil cases in the superior court of this state under Article 3 (commencing with Section 2016) of Chapter 3 of Title 4 of Part 4 of the Code of Civil Procedure, in order to ensure a fair and expeditious investigation and/or investigative hearing. The 60 working day period governing the issuance of the Notice of Findings set forth in Section 56.5(a) shall be tolled for any period of non-compliance by any party to the investigation or investigative hearing.

(b) The Executive Officer shall issue findings regarding the allegations contained in the complaint and a recommended remedy, if any, based on the investigation or investigative hearing, in accordance with the provisions of Section 56.5.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19582, 19583.5 and 19683, Government Code; and Section 6129, Penal Code, and Section 2016 et seq., Civil Procedure Code.

§ 56.4. Petition for Hearing by Respondents Before the Board. Cases Referred to Informal Hearing Before an ALJ.

~~(a) Any named respondent found in the Notice of Findings to have engaged in retaliatory conduct may file a Petition for Hearing before the Board, contesting the findings of fact and conclusions regarding the legal causes for discipline and/or the penalty to be imposed.~~

~~(b) A Petition for Hearing must be filed with the Executive Officer and served on each named party to the initial complaint within 30 days of service of the Notice of Findings. The Petition for Hearing must include a copy of the Notice of Findings. Service may be accomplished by mailing a copy of the Petition for Hearing, with proof of service attached, to the home or business address of each named party to the complaint.~~

~~(c) Each Petition for Hearing shall be in writing and identify the facts that form the basis for the request, but shall be limited to those allegations, issues, defenses, or requests for relief raised in the written pleadings filed during the Notice of Findings process. Any allegation, issue, defense, or request for relief not raised in the written pleadings during the Notice of Findings process shall be deemed waived, except upon petition and determination by the Board of good cause.~~

~~(d) The complainant shall be permitted an opportunity to submit a written opposition to the Petition for Hearing. Any written opposition to the Petition for Hearing shall be filed with the Board no later than 20 days after the date the Petition for Hearing was served on the complainant.~~

~~(e) In reviewing any such Petition for Hearing, the Board shall determine whether the Notice of Findings conforms to the requirements of Section 56.4(c), and whether the Notice of Findings is supported by substantial evidence.~~

~~(f) If the Petition for Hearing is denied, the Board shall issue a Decision that adopts the findings of the Executive Officer as its own decision in the matter.~~

~~(g) If the Petition for Hearing is granted by the Board, the Board shall issue a resolution assigning the matter to an administrative law judge, who shall conduct an evidentiary hearing in accordance with those statutes and regulations governing the conduct of Board evidentiary hearings, and issue a Proposed Decision for the Board's review and consideration.~~

~~(h) The evidentiary hearing shall be based solely on those allegations, issues, defenses, and requests for relief raised by the parties in the written pleadings during the Notice of Findings process, except in those cases where the Board has determined, pursuant to subdivision (c) of this section, that good cause exists to permit the moving party to amend the pleadings. Any document submitted by any party as part of the written pleadings during the Notice of~~

~~Findings process shall not be considered by the administrative law judge during the evidentiary hearing, unless each document is first introduced and deemed to be relevant and admissible evidence by the administrative law judge during the course of the evidentiary hearing. Each named respondent shall have the right to be represented by a legal representative of his or her own choosing during the hearing, and to present a defense to the allegations contained in the complaint, separate and apart from the defense presented by any other named respondent.~~

~~(i) The Board may, in its sole discretion, adopt, reject, or modify the Proposed Decision. If the Board rejects the Proposed Decision, the parties shall be afforded an opportunity to present written and/or oral argument to the Board at a date, time and location designated by the Board, after which time the Board shall issue its own decision concerning the matter.~~

~~(j) Any Decision issued by the Board in accordance with this section shall be deemed a final decision of the Board, and the individual against whom any disciplinary action is taken as a result of that Decision shall not have any right of further appeal to the Board concerning that action, with the exception of a Petition for Rehearing.~~

(a) For those complaints assigned to an informal hearing before an administrative law judge, the Board *SPB* shall serve notice of the informal hearing on all parties to the complaint a minimum of 30 *calendar* days prior to the scheduled hearing date. Service on each respondent shall be made at the respondent's business address. The notice shall:

(1) include a complete copy of the complaint with all attachments, and a copy of the statutes and rules governing the informal hearing; and

(2) require each named respondent to serve on the complainant and file with the Board *SPB*, at least 10 *calendar* days prior to the informal hearing, a written response to the complaint, signed under penalty of perjury, specifically addressing the allegations contained in the complaint.

(b) The informal hearing shall be conducted in conformance with those procedures set forth in Government Code Section 11445.10 *et seq.*, and may in the discretion of the administrative law judge, include such supplemental proceedings, informal or formal, as ordered by the administrative law judge, *and as permitted by Section 11445.10 et seq.*, to ensure that the case is heard in a fair and expeditious manner. The administrative law judge shall have full authority to question witnesses, inspect documents, visit state facilities in furtherance of the hearing, and otherwise conduct the hearing in the manner and to the degree he or she deems appropriate. The informal hearing and any supplemental proceedings shall be recorded by the administrative law judge. *All parties shall, upon request and payment of applicable reproduction costs, be provided with a transcript or a copy of the recording of the informal hearing.*

(c) Following the informal hearing and any supplemental proceedings, the administrative law judge shall issue findings for consideration by the Executive Officer regarding the allegations contained in the complaint, together with all recommended relief, if any, proposed to remedy any retaliatory conduct.

(d) The Executive Officer shall have the discretion to adopt the administrative law judge's findings and recommended remedies in their entirety;

modify the administrative law judge's findings and recommended remedies; or reject the administrative law judge's findings and recommended remedies, and:
(1) issue independent findings after reviewing the complete record; or
(2) remand the case back to the administrative law judge for further proceedings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 11445.10 *et seq.*, 11513, 18670, 18671, 18672, 18675, 19572, 19574, 19575, 19582, 19590, 19592 and 19683, Government Code; and Section 6129, and Penal Code.

§ 56.5. Decision Adopting the Notice of Findings. Findings of the Executive Officer.

~~If no Petition for Hearing is received pursuant to the provisions of Section 56.3 or 56.4, the Notice of Findings shall be deemed to be the Board's final Decision in the matter, and no named party to the action shall be deemed to have any right of further appeal to the Board.~~

(a) The Executive Officer shall issue a Notice of Findings within 60 working days of the date the Board *SPB* accepts the complaint pursuant to Section 56.2(c), unless the complaining party agrees, in writing, to extend the period for issuing the findings, or unless the time period is otherwise tolled or waived.

(b) In those cases where the Executive Officer concludes that the allegations of retaliation were not proven by a preponderance of the evidence, the Executive Officer shall issue a Notice of Findings dismissing the complaint. The Notice of Findings shall notify the complainant that his or her administrative remedies have been exhausted and that the complainant is free to *may* file a civil complaint with the superior court pursuant to Government Code Section 8547.8(c).

(c) In those cases where the Executive Officer concludes that the complainant proved one or more of the allegations of retaliation by a preponderance of the evidence, the Notice of Findings shall identify the allegations deemed substantiated, and the named respondents deemed to have engaged in retaliatory acts toward the complainant. If the Notice of Findings concludes that any individual manager, supervisor, or other employee engaged in improper retaliatory acts, the Notice of Findings shall include the legal causes for disciplinary action under Government Code Section 19572 and the appropriate disciplinary action to be taken against any individual found to have engaged in retaliatory conduct.

(d) The Notice of Findings shall inform any respondent found to have engaged in retaliatory acts of his or her right to request a hearing regarding the Notice of Findings. Any such request shall be filed with the Board *SPB*, and served on all other parties within 30 *calendar* days of the issuance of the Notice of Findings. Upon receipt of a timely request for hearing, the Board shall, at its discretion, schedule a hearing before the ~~five member~~ Board, or an evidentiary

hearing before an administrative law judge, regarding the findings of the Executive Officer. The hearing shall be conducted in accordance with the SPB's rules governing the conduct of evidentiary hearings. If a timely request for hearing is not filed with the Board SPB, the Notice of Findings shall be deemed the Board's final decision in the case.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671.1, 18675, 19572, 19574, 19575, and 19582, 19590 and 19683, Government Code; and Section 6129, Penal Code.

§ 56.6. Disciplinary Action for Proven Retaliatory Acts.

(a) In those cases where the Board issues a final ~~D~~decision that finds that any a manager, supervisor, or other state civil service employee has engaged in improper retaliatory acts, the Board shall ~~O~~order the appointing authority to place a copy of the Board's ~~D~~decision in that individual's Official Personnel File. ~~The Decision shall set forth the legal causes for discipline under Section 19572, and a statement of the penalty imposed on the individual. The appointing authority shall place the Decision in the individual's Official Personnel File within 30 calendar days of the issuance of the Board's Oorder and shall to also, within that same time period, notify the Office of the State Controller of the disciplinary action taken against the individual. The appointing authority shall also, within 40 calendar days of the issuance of the Board's Oorder, notify the Board that it has complied with the provisions of this subdivision.~~

(1) In accordance with the provisions of Penal Code Section 6129, subsection (c)(3), any employee of the Department of Corrections and Rehabilitation found to have engaged in retaliatory acts shall be disciplined by, at a minimum, a suspension without pay for 30 calendar days, unless the Board determines that a lesser penalty is warranted. In those instances where the Board determines that a lesser penalty is warranted, the decision shall specify the reasons for that determination.

(b) In those cases where the Board issues a final ~~D~~decision that finds that any community college administrator, supervisor, or public school employer, has engaged in improper retaliatory acts, the Board shall ~~O~~order the appointing authority to place a copy of the Board's ~~D~~decision in that individual's ~~Official Personnel record~~ File. ~~The appointing authority shall place the Decision in the individual's Official Personnel File within 30 calendar days of the issuance of the Board's Oorder and shall to also, within 40 calendar days of the issuance of the Board's Oorder, notify the Board that it has complied with the provisions of this subdivision.~~

(c) Any ~~D~~decision, as described in subdivision (a) or (b), shall be deemed a final decision of the Board and the individual against whom the disciplinary action was taken shall not have any further right of appeal to the Board concerning that action, with the exception of a Petition for Rehearing.

(d) For purposes of this Section, the Board's decision is deemed to be final after:

(1) a request for hearing pursuant to Section 56.5(ed) has not been timely filed with the Board; or

(2) 30 *calendar* days has elapsed from the date that the ~~five member~~ Board has issued a decision adopting or modifying the proposed decision submitted by an administrative law judge after an evidentiary hearing and a Petition for Rehearing concerning that decision has not been filed with the Board; or

(3) a decision has been issued by the ~~five member~~ Board after a hearing before that body and no Petition for Rehearing concerning that decision has been filed with the Board.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 18710, 19572, 19574, 19582, 19583.5, 19590, 19592, and 19683, Government Code; and Section 6129, Penal Code.

§ 56.7. Consolidation with Other Hearings.

(a) The SPB or the assigned administrative law judge shall possess the requisite discretion to direct that separate, reasonably related cases be consolidated into a single hearing. Whenever two or more cases are consolidated, the assigned administrative law judge shall permit the parties a reasonable opportunity to conduct discovery prior to the first scheduled hearing date, if the discovery provisions set forth in Section 57 et seq. are negatively impacted by the consolidation.

(b) In those cases where one or more individually named respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.

(ac) In those cases where an appeal from adverse action, rejection during probationary period, medical action, or non-punitive action is consolidated with a whistleblower retaliation complaint, and the whistleblower retaliation complaint identifies specifically named individuals against whom damages or adverse action is sought pursuant to the provisions of Section 56.1(~~d~~)(7) (d) and (e), each individually named respondent shall have the right to participate in the consolidated hearing in such a manner as to reasonably defend him or herself against the allegations contained in the whistleblower retaliation complaint. These rights shall include, but not be limited to:

(1) to be represented by a representative of his or her own choosing during the consolidated hearing;

(2) to present a defense on his or her own behalf concerning the allegations and issues raised in the whistleblower retaliation complaint, separate and apart from any defense presented by the appointing power or any other named respondent;

(3) to conduct pre-hearing discovery concerning allegations and issues raised in the whistleblower retaliation complaint;

(4) to examine and cross examine witnesses concerning allegations and issues raised in the whistleblower retaliation complaint;

(5) to introduce and challenge the introduction of evidence concerning allegations and issues raised in the whistleblower retaliation complaint; and

(6) to present oral and/or written argument to the decision-maker concerning allegations and issues raised in the whistleblower retaliation complaint.

~~(b) In those cases where one or more individually named respondents have been joined in the consolidated hearing, the administrative law judge may, in his or her discretion, make such orders as may appear just in order to prevent any named respondent from being embarrassed, delayed, or put to undue expense, and may order separate hearings or make such other order as the interests of justice may require.~~

NOTE: Authority cited: Sections 18701 and 18214, Government Code.

Reference: Sections 8547.8, 11513, 18670, 18671, 18672, 18675, 19175, 19253.5, 19575, 19582, 19585, 19590 and 19683, Government Code.

§ 56.8. Discovery, Evidentiary Hearing Procedures and Representation by the Executive Officer.

~~The discovery provisions set forth in Section 57-57.4 shall apply to this section.~~

~~NOTE: Authority cited: Section 18701, Government Code.~~

~~Reference: Section 87164, Education Code; Sections 8547.8, 18671, 18672, 18672.1, 18673, 18675 and 19683, Government Code.~~

(a) The hearing conducted pursuant to Section 56.5(d), shall be conducted in accordance with the Board's SPB's rules of practice and procedure for the conduct of hearings before the five-member Board, or evidentiary hearings before an administrative law judge. Any proposed decision issued by an administrative law judge after an evidentiary hearing shall be subject to review by the five-member Board.

(b) The administrative law judge assigned to conduct the evidentiary hearing shall not be the same administrative law judge who conducted the informal investigative hearing in the case, unless all parties to the action request, in writing, that the same administrative law judge be assigned to conduct the evidentiary hearing.

(c) The discovery procedures set forth in Section 57 et seq., shall be applicable to those evidentiary hearings conducted pursuant to this sSection.

(d) The Executive Officer, or his or her designee, shall have the authority, in his or her discretion, to prosecute the complaint *and present evidence regarding his or her findings* during a hearing before the ~~five-member~~ Board, and/or during an evidentiary hearing before an administrative law judge. The Executive Officer, or his or her designee, shall have the discretion to present the case in the manner he or she deems to be appropriate, including, but not limited to, the issues to be presented, the evidence to be presented, and the witnesses, if any, to be questioned.

(1) The complaining party shall be permitted to ~~also~~ be represented by a representative of his or her own choosing during any hearing before either the ~~five-member~~ Board, and/or an administrative law judge, and shall be permitted to raise *relevant* issues, present *relevant* evidence, and question witnesses *regarding relevant matters* during those hearings where witness testimony is permitted.

(2) In those cases where the Executive Officer, or his or her designee prosecutes a case during an evidentiary hearing before an administrative law judge, the case shall be assigned to an administrative law judge from the Office of Administrative Hearings.

NOTE: Authority cited: Sections 18701 and 18214, Government Code.
Reference: Section 87164, Education Code; Sections 8547.8, 18670, 18671, 18675, 19572, 19574, 19575, 19683 and 19590, Government Code; and Section 6129, Penal Code.